REMARKS

This Amendment is submitted in reply to the final Office Action mailed on October 30, 2006. A Terminal Disclaimer is submitted herewith. The Director is authorized to charge $130.00 for the Terminal Disclaimer and any additional fees which may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 112701-574 on the account statement.

Claims 1-20 are pending in this application. In the Office Action, Claims 7-8 are rejected under 35 U.S.C. §112, first paragraph. Claims 1-6 and 10-20 are rejected under 35 U.S.C. §103 and Claims 1-20 have been provisionally rejected on the ground of non-statutory obviousness-type double patenting. In response, Claims 1, 11-13, 16, 18 and 20 have been amended. In view of the amendments and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claims 7-8 are rejected under 35 U.S.C. §112, first paragraph, for allegedly failing to comply with the enablement requirement because the specification does enable any person skilled in the art to practice these claims. In response, Applicants respectfully submit that a flavor attribute that is an enzymatic hydrolysate of a cocoa polysaccharide (Claim 7) and a flavor attribute that is a malty crumb flavor obtained by acid treatment of a cocoa liquor followed by a protease treatment (Claim 8) are both sufficiently disclosed in the specification and are within the capabilities of one having ordinary skill in the art. With respect to Claim 7, Applicants disclose that hydrolysis of cocoa shell pectin is carried out by chemical or enzymatic degradation, both of which are processes known to one of ordinary skill in the art. Moreover, specific enzymes that may be used in such enzymatic degradation are listed in the specification. See, specification, page 7, lines 13-20. Further, in Example 6 at page 12, lines 7-14 of the specification, Applicants illustrate an example of enzymatic degradation resulting in a casein hydrolysate. Similarly, in Example 12, Applicants disclose the preparation of an enzyme-treated extract from cocoa shell that results in a final product having an amount of liberated rhamnose. See, specification, page 13, line 20-page 4, Table 2. Applicants respectfully submit that one of ordinary skill in the art would recognize that an enzymatic hydrolysate of a cocoa polysaccharide could be prepared in a similar manner.

With respect to Claim 8, Applicants respectfully submit that a flavor attribute that is a malty crumb flavor obtained by acid treatment of a cocoa liquor followed by a protease treatment is sufficiently discussed in the specification and is within the capabilities of one having ordinary skill in the art. In the detailed description, Applicants disclose, in part, methods of performing both the acid treatment and subsequent protease treatment, treatment times, and certain reaction conditions. See, specification, page 8, line 20-page 9, line 4. Applicants respectfully submit that one having ordinary skill in the art would recognize this information as enabling any person skilled in the art to practice Claim 8.

Moreover, Applicants respectfully submit that every possible enzymatic hydrolysate or acid treatment need not be disclosed by Applicants because these are understood by the skilled artisan. In fact, a patent need not teach, and preferably omits, what is well known in the art. See, MPEP 2164.01. As a result, one having ordinary skill could make and use Claims 7-8 without undue experimentation.

Based on at least these noted reasons, Applicants believe that Claims 7-8 fully comply with 35 U.S.C. §112, first paragraph. Accordingly, Applicants respectfully request that the rejection of Claims 7-8 under 35 U.S.C. §112, first paragraph, be withdrawn.

In the Office Action, Claims 1-5 and 11-20 are rejected under 35 U.S.C. §103(a) as anticipated by GB 2,033,721 to Ripper ("*Ripper*") in view of U.S. Patent No. 2,835,590 to *Rusoff* ("*Rusoff*"). In view of the amendments and/or for the reasons set forth below, Applicants respectfully submit that the rejection be withdrawn.

Presently amended Claims 1, 11-13, 16, 18 and 20 are directed, in part, to a process for manipulating the flavor of a single mass of chocolate which comprises, for example, utilizing a conventional process for manufacturing the chocolate; and adding a flavor effective amount of a non-cocoa/dairy flavor attribute to the chocolate mass thus manipulating its flavor. These amendments are supported in the specification at, for example, page 1, lines 1-33. Specifically, the chocolate is made by a standard process using conventional ingredients well known to persons skilled in the art. For example, this is described in the Background section of the specification, which describes several traditional methods of producing "chocolate," which includes standard chocolate as well as substitute chocolate such as compound, couvertures or ice cream coatings.

The Background of the present disclosure further recites "[l]ocal chocolates are often unique and contain flavors that are important for the consumer and it has been known for many years to add flavors to chocolate. Traditionally, addition of flavors is done for one of two reasons. First, modification or enhancement of the cocoa or dairy flavor (e.g., to give a rounded smoothness to the profile or to create a creamy note, which is usually done by adding up to 0.2% of vanilla, vanillin, ethyl vanillin, etc); or second, to impose a different, overriding, dominant but compatible flavor (e.g., by adding orange oil, peppermint oil, strawberry, raspberry, etc).

It is well known that there are a large number of different consumer-recognisable flavor attributes associated with chocolate, other than the mere enhancement of the chocolate flavor or a different overriding, dominant flavor, which vary considerably around the world according to local consumer preferences. As used in the present disclosure, a "flavor attribute" means a consumer-recognizable flavor attribute associated with chocolate and as defined in the specification. A "flavor attribute" in the present disclosure does not include the mere enhancement of the chocolate flavor (e.g., by adding vanilla, or a different overriding, dominant flavor such as peppermint). These flavor attributes of chocolate products are determined by variations in the process and the amounts of the normal ingredients used in chocolate manufacture (e.g., cocoa and milk). These flavor attributes may be obtained by adding non-cocoa and/or milk/dairy flavors and may include, for example, roasted, sweet, bitter, crumb, caramel, fruity, floral, biscuit, bouquet, spicy, scented, baked, bready, cereal, popcorn, malty, astringent and praline. For the following reasons, Applicants respectfully submit that there is no suggestion or motivation to combine the cited references to obtain the present claims, and even if combinable, all of the claimed elements are not taught or suggested by the cited references.

Applicants respectfully submit that one having ordinary skill in the art would not be motivated to combine *Ripper* and *Rusoff* to arrive at the present claims. For example, *Ripper* is entirely directed to avoiding the conching step which is normally carried out during traditional chocolate manufacture. This is in contrast with the present claims where several traditional methods of making chocolate are described in the Background of the Invention, all of which involve conching. As defined by the present disclosure, the term "chocolate" includes standard chocolate as well as substitute chocolate. Clearly, a standard or a substitute chocolate may be made by traditional manufacturing methods including a conching step. Because *Ripper* teaches a

simpler, quicker, non-traditional method of producing chocolate, it teaches away from the present claims.

Further, *Rusoff* also teaches away from present invention because *Rusoff* is directed toward an artificial chocolate flavor that serves as a substitute for cocoa. The Patent Office notes that the flavors of *Rusoff* may be used as fortifiers or extenders of natural chocolate flavor (i.e. an enhancer of cocoa flavors). See, Office Action, page 5. In contrast, however, the present claims are directed toward flavor attributes that are defined in the specification as flavor attributes other than the mere enhancement of the chocolate flavor. See, specification, pages 4-6. *Rusoff*, therefore, teaches away from the present invention, which requires, in part, a chocolate mass that comprises a flavor attribute that is added to the cocoa of the chocolate mass. Because the cited references teach away from the claimed invention, the skilled artisan would have no reasonable expectation of success in combining the cited references to arrive at the present claims.

Applicants respectfully submit that references must be considered as a whole and those portions teaching against or away from the claimed invention must be considered. *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve Inc.*, 796 F.2d 443 (Fed. Cir. 1986). "A prior art reference may be considered to teach away when a person of ordinary skill, upon reading the reference would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the Applicant." *Monarch Knitting Machinery Corp. v. Fukuhara Industrial Trading Co., Ltd.*, 139 F.3d 1009 (Fed. Cir. 1998) (quoting *In re Gurley*, 27 F.3d 551 (Fed. Cir. 1994)).

In its attempt to arrive at the present claims by combining the cited references, the Patent Office has ignored significant portions of each reference that teach away from the combination. Rather, what the Patent Office has done is to rely on hindsight reconstruction of the claimed invention. Applicants respectfully submit that it is only with a hindsight reconstruction of Applicants' claimed invention that the Patent Office is able to even attempt to piece together the teachings of the prior art so that the claimed invention is allegedly rendered obvious. Instead, the claims must be viewed as a whole as defined by the claimed invention and not dissected into discrete elements to be analyzed in isolation. *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1548 (Fed. Cir. 1983); *In re Ochiai*, 71 F.3d 1565, 1572 (Fed. Cir. 1995). One should

not use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 F.2d at 1075 (Fed. Cir. 1988).

Applicants also respectfully submit that, even if combinable, all of the claimed elements are not taught or suggested by the cited references. For example, *Ripper* fails to disclose or suggest any method of manipulating the flavor of chocolate or producing chocolate by utilizing by adding an effective amount of a non-cocoa/dairy flavor attribute to a chocolate mass as recited, in part, in the present claims. Although *Ripper* discloses the addition of flavors in examples, a person having ordinary skill in the art would assume, in the absence of any teaching to the contrary, that the added flavors are conventionally added flavors as stated above in connection with the modification or enhancement of the cocoa or dairy flavor (e.g., to give a rounded smoothness to the profile or to create a creamy note, which is usually done by adding up to 0.2% of vanilla, vanillin, ethyl vanillin, etc.) or to impose a different, overriding, dominant but compatible flavor (e.g., by adding orange oil, peppermint oil, strawberry, raspberry, etc).

Rusoff also fails to disclose or suggest any method of manipulating the flavor of chocolate or producing chocolate by adding an effective amount of a non-cocoa/dairy flavor attribute to a chocolate mass as recited, in part, in the present claims. As defined by the present disclosure, a "chocolate mass" is a mixture containing sugar, cocoa butter, cocoa liquor or cocoa nibs, and milk (if a milk chocolate is made). See, Background to the Invention. On the contrary, *Rusoff* is directed toward an artificial chocolate flavor substitute for elimination of reliance on cacao as a source of chocolate flavor and a process for making same. As such, any flavor attribute that is added to raw materials to make chocolate in *Rusoff* is not added to the equivalent of the chocolate mass as recited, in part, in the present claims since the chocolate flavor of *Rusoff* replaces (i.e., is not mixed with) the cocoa of the chocolate mass equivalent of the present disclosure.

With respect to Claims 14 and 15, Applicants respectfully submit that one having ordinary skill in the art would not be motivated to combine *Ripper* and *Rusoff* to arrive at the present claims. For example, *Ripper* is entirely directed to methods for avoiding the conching step which is normally carried out during traditional chocolate manufacture. On the contrary, *Rusoff* is directed to an artificial chocolate flavor substitute for elimination of reliance on cacao as a source of chocolate flavor and a process for making same. Because the present claims are

directed toward a chocolate product that contains cocoa and a flavor effective amount of a non-cocoa/dairy flavor attribute, the cited references teach away from the present claims.

Applicants also respectfully submit that, even if combinable, all of the claimed elements of Claims 14 and 15 are not taught or suggested by the cited references. Both *Ripper* and *Rusoff* fail to disclose a chocolate product containing a flavor effective amount of a non-cocoa/dairy flavor attribute having a flavor attribute associated with chocolate other than chocolate flavor enhancement or an overriding, dominant flavor that is different from chocolate as is required, in part, by Claim 14. Further, both *Ripper* and *Rusoff* fail to disclose a chocolate product containing a flavor effective amount of a non-cocoa/dairy flavor to provide roasted, sweet, bitter, crumb, caramel, fruity, floral, biscuit, baked, bready, popcorn, cereal, malty, astringent or praline attributes, as is required, in part, by Claim 15.

For at least the reasons discussed above, the combination of *Ripper* in view of *Rusoff* is improper, and thus, fails to render the claimed subject matter obvious.

Accordingly, Applicants respectfully request that the obviousness rejection with respect to Claims 1-5 and 11-20 be reconsidered and the rejection be withdrawn.

In the Office Action, Claims 1-4, 6 and 10-20 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Ripper* in view of U.S. Patent No. 3,769,030 to Kleinert ("*Kleinert*") or U.S. Patent No. 5,676,993 to Watterson ("*Watterson*"). Applicants respectfully submit that one having ordinary skill in the art would not be motivated to combine the cited references to arrive at the present claims. As discussed herein above, *Ripper* teaches a simpler, quicker, non-traditional method of producing chocolate by eliminating the conching step used in conventional manufacturing processes for producing chocolate. Similarly, *Kleinert* relates to a method for the fabrication of chocolate paste, especially milk chocolate paste, wherein cocoa is deodorized and the paste obtained by incorporating the deodorized cocoa is finished without conching. Therefore, the aim of *Kleinert* is also to avoid the conching step which is normally carried out during traditional chocolate manufacture. Therefore, both *Ripper* and *Kleinert* teach away from the present claims, which are directed to a traditional process of producing chocolate flavor.

Further, *Watterson* also teaches away from present invention because *Watterson* discloses a process for enhancing cocoa flavor in a fat matrix. In the specification, *Watterson*, clearly discloses that a main objective of the invention would be to enhance cacao flavor in order to

utilize more of the less expensive beans without sacrificing flavor quality. See, *Watterson*, column 3, lines 24-27. In contrast, however, and as described herein above, the present claims are directed toward flavor attributes that are defined in the specification as flavor attributes other than the mere enhancement of the chocolate flavor. See, specification, pages 4-6. *Watterson*, therefore, teaches away from the present invention, which requires, in part, a chocolate mass that comprises a flavor attribute that is added to the cocoa of the chocolate mass. Because the cited references teach away from the claimed invention, the skilled artisan would have no reasonable expectation of success in combining the cited references to arrive at the present claims.

Applicants also respectfully submit that, even if combinable, all of the claimed elements are not taught or suggested by the cited references. For example and as discussed herein above, *Ripper* fails to disclose or suggest any method of manipulating the flavor of chocolate or producing chocolate by adding an effective amount of a non-cocoa/dairy flavor attribute to a chocolate mass as recited, in part, in the present claims.

Kleinert also fails to disclose or suggest any method of manipulating the flavor of chocolate by adding an effective amount of a non-cocoa/dairy flavor attribute to the chocolate mass as required, in part, by the present claims. Although *Kleinert* discloses the addition of flavors, a person skilled in the art would assume, in the absence of any teaching to the contrary, that the added flavors are conventionally added flavors as stated above in connection with the modification or enhancement of the cocoa or dairy flavor or to impose a different, overriding, dominant but compatible flavor.

Similarly, *Watterson* also fails to disclose or suggest any method of manipulating the flavor of chocolate by adding an effective amount of a non-cocoa/dairy flavor attribute to the chocolate mass as required, in part, by the present claims. Instead, *Watterson* is directed toward enhancement of cocoa flavors. In contrast, and as discussed herein above, the term "flavor attribute" in the present claims means a consumer-recognizable flavor attribute associated with chocolate and not the mere enhancement of the chocolate flavor or a different overriding, dominant flavor.

With respect to Claims 14 and 15, Applicants respectfully submit that one having ordinary skill in the art would not be motivated to combine *Ripper* and *Kleinert* or *Watterson* to arrive at the present claims. For example, *Ripper, Kleinert and Watterson* are all directed to

methods for producing chocolate or chocolate flavors. On the contrary, independent Claims 14 and 15 are directed toward a chocolate product that contains cocoa and a flavor effective amount of a non-cocoa/dairy flavor attribute. Therefore, Applicants respectfully submit that there exists no motivation to combine the cited references to arrive at the present claims.

Applicants also respectfully submit that, even if combinable, all of the claimed elements of Claims 14 and 15 are not taught or suggested by the cited references. For example, *Ripper Kleinert* and *Watterson* all fail to disclose a chocolate product containing a flavor effective amount of a non-cocoa/dairy flavor attribute having a flavor attribute associated with chocolate other than chocolate flavor enhancement or an overriding, dominant flavor that is different from chocolate as is required, in part, by Claim 14. Further, *Ripper Kleinert* and *Watterson* fail to disclose a chocolate product containing a flavor effective amount of a non-cocoa/dairy flavor to provide roasted, sweet, bitter, crumb, caramel, fruity, floral, biscuit, baked, bready, popcorn, cereal, malty, astringent or praline attributes, as is required, in part, by Claim 15.

For at least the reasons discussed above, the combinations of *Ripper* in view of *Kleinert* or *Watterson* are improper, and thus, fail to render the claimed subject matter obvious.

Accordingly, Applicants respectfully request that the obviousness rejection with respect to Claims 1-4, 6 and 10-20 be reconsidered and the rejection be withdrawn.

In the Office Action, Claims 1-20 have been provisionally rejected on the ground of non-statutory obviousness-type double patenting as being unpatentable over Claims 1-21, 23 and 25 of co-pending Application No. 10/819,180. Submitted with this response is a Terminal Disclaimer disclaiming the terminal part of any patent issued from the pending application extending beyond the expiration date of any patent issued from U.S. Application No. 10/819,180.

Accordingly, Applicants respectfully request that the provisional rejection of Claims 1-20 on the ground of non-statutory obviousness-type double patenting be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

BELL, BOYD & LLOYD LLC

BY _____

Robert M. Barrett
Reg. No. 30,142
Customer No.: 29157

Dated: January 30, 2007